85-1323

No.

Supreme Court, U.S.
FILED
FEB 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

Term 1986

GEORGE D. KING,

Petitioner,

vs.

UNIVERSITY OF MINNESOTA, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. MAY A FEDERAL JUDGE ELIMINATE A PARTY'S RIGHT TO A JURY TRIAL MERELY BY DISMISSING ALL DAMAGES CLAIMS?

II. MAY AN APPELLATE COURT TEST THE RIGHT TO A JURY TRIAL BY WHETHER A TRIAL COURT *COULD* HAVE DIRECTED A VERDICT, WHERE FACT QUESTIONS EXISTED?

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CITATIONS TO OPINIONS BELOW

The Opinion of the three judge panel of the Eighth Circuit Court of Appeals which contains that Court's decision relating to the issues here involved is reported at 774 F.2d 224 (8th Cir. 1985). A copy of that Opinion is printed in the Appendix, *infra*, pages A-2 through A-11. The Decision of the Eighth Circuit Court of Appeals denying Petitioner's Motion for rehearing involved herein is not yet reported but is printed in the Appendix, *infra*, pages A-1. The Judgment and Opinion of the District Court after trial is not reported but is printed in the Appendix, *infra*, pages A-12 through A-20. The pretrial memorandum striking the jury demand and dismissing damages is not reported but is printed in the Appendix, *infra*, pages A-21 through A-24.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit, by a three judge panel, rendered its original Opinion herein on September 25, 1985. Petitioner's Motion for Rehearing before the Court En Banc, was denied on November 6, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTES INVOLVED

AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."
>
> As amended by the Act of Dec. 29, 1979, Pub. L. No. 96-170, §1, 93 Stat. 1284.

STATEMENT OF CASE

Petitioner, George D. King, is a black citizen who was terminated from his position after 13 years, as tenured full professor at the University of Minnesota. Petitioner was fired by Respondent Lukermann. The Notice contained one charge, "a pattern of repeated inaction" and referred to some prior correspondence between Petitioner and Lukermann. Petitioner appealed the decision, pursuant to the tenure code.

Internal review procedures, including a hearing, resulted in a recommendation for immediate termination. The Respondent Board of Regents, however, voted seven to two *not* to fire Petitioner. Instead, the Regents placed Petitioner on probation for one year.

Approximately one month later, with no evidence of new charges or new evidence, the Regents reversed themselves and voted eight to four to fire Petitioner immediately. During the intervening weeks, Respondent Lukermann had secretly met with several faculty members (T. 1127-29, 1158) who both wrote letters and solicited letters from other faculty members petitioning the Board of Regents to reverse their decision not to fire Petitioner (T. 1081-2, 1162-64, T. 439).

Petitioner filed suit under 42 U.S.C. § 1983 based on violations, inter alia, of due process and equal protection. He sued Respondent Lukermann in his individual capacity for 1) failure to give adequate notice, [Lukermann had the *sole* responsibility to give notice as well as to fire Petitioner] and 2) for mobilizing faculty to secretly petition the Regents for reversal of their decision not to fire Petitioner. Petitioner sought compensatory damages, punitive damages and backpay against Respondent Lukermann in his individual capacity.

The trial court denied Respondent's motion for summary judgment but dismissed the damages claim against Respondent Lukermann on grounds of causation, ruling as a matter of law, that since Lukermann was not the final decision-maker he could not have caused the deprivation.

Petitioner sued the University of Minnesota, the Board of Regents, members of the Board of Regents and University President all in their official capacities, seeking compensatory and punitive damages as well as reinstatement, declaratory and injunctive relief. Prior to trial the district court denied Respondents' motion for summary judgment on the due process and equal protection claims. The trial court dismissed the damages claim against the University and others in their official capacity on grounds of the Eleventh Amendment.

Immediately before trial, the District Court struck Petitioner's jury demand based upon his earlier dismissal of damages. Appendix (A-24).

The case was tried to the Court in May 1984. At the close of Petitioner's case, Respondents moved for a dismissal. It was denied. On June 14, 1984, the Court rendered its opinion on the *merits* and entered judgment in favor of Respondents. Petitioner appealed to the U.S. Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the decision on the *merits*. It declined to address the Seventh Amendment issue, ruling that the denial of a jury trial and dismissal of damages were harmless error. It reasoned that since the district court *could* have granted a directed verdict, the denial of a jury was harmless error. The district court had, however, expressly denied Respondents' Motion for dismissal at the end of Petitioner's case in chief. Moreover, the district court did not grant a Rule 41(b) dismissal. Rather, it entered judgment on the merits.

JURISDICTION OF FEDERAL COURT

This action is one for alleged violation of 42 U.S.C. §1983 and jurisdiction is pursuant to 28 U.S.C. §1343.

REASONS FOR GRANTING THE WRIT

I. This Court Has Never Decided, But Should Decide, Whether A Federal Judge has the Authority to Convert an Action at Law into a Suit in Equity.

By its decision to strike the jury, the trial judge converted an action at law to a suit in equity. This unwarranted assumption of power is another example of a history replete with judicial encroachments upon the right to trial by jury. "[E]very encroachment upon it has been watched with great jealousy," *Parson v. Bedford*, 28 U.S. (3 Pet) 433, 446 (1830).

If a jury trial can be eliminated merely by the dismissal of damages, then federal judges who are opposed to juries will quickly clear the jury docket. Litigants will lose the common sense judgment of members of the community. The exercise of power will no longer be determined by the community mores, but rather by a "professional" who may have become hardened by years of hearing similar testimony and who lacks the fresh perspective of a jury who decides only this one case.

The Court of Appeals declined to address the jury denial or damages dismissal, concluding that both were harmless error. It reasoned that the trial court *could* have directed a verdict and therefore, any error was harmless. If appellate review is satisfied by a hypothetical conclusion, based on hindsight, then jury denials will always be harmless and the Seventh Amendment will be an empty protection.

In reliance on what it conceived to be principles established by this court in *Galloway v. United States*, 319 U.S. 372, 389-396 (1943) the Eighth Circuit held that a jury denial should be decided by whether a trial court *could* have directed a verdict. This statement is a perversion of the principle that a directed verdict does not violate the right to a jury trial. It simply does not follow that the right to a jury depends on whether a court could have granted a directed verdict. Certainly that review standard is inapplicable where the court has already recognized that fact issues existed and then resolved those factual disputes.

The decision to strike the jury demand was contrary to the mandate of the Seventh Amendment which provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . .".

This action alleged a deprivation of property without due process or equal protection of the law. Prior to the adoption of the Seventh Amendment, denials of due process were recognized as actions at law. They were not suits in equity or in admiralty. Therefore, the right to try this action to a jury was guaranteed by the Seventh Amendment.

Even if a claim of due process is tested under the standard applied to new causes of action, i.e. treating section 1983 actions as a new statute providing a remedy for constitutional violations, either party was entitled to a jury trial based on the criteria set forth by this Court, to-wit:

1) the premerger custom;
2) the remedy sought; and
3) the practical limitations and ability of jurors.

Ross v. Bernard, 396 U.S. 531, 538 (1970). There is no question that plaintiff sought legal relief — compensatory and punitive damages. These are traditional forms of relief offered in courts of law. *Curtis v. Loether*, 415 U.S. 189, 196 (1974). In actions under Section 1983, compensatory damages are mandatory, once liability is found. *Smith v. Wade*, 461 U.S. 30, 52 (1983). In addition, this court has recognized that punitive damages are available in actions under Section 1983. *Id.* at 56. Penal damages remain a right enforcible only in a common law action. *Fleitmann v. Welsbach Street Lighting*, 240 U.S. 27 (1916) cited in *Decorative Stone Co. v. Building Trades Council of Westchester*, 23 F.2d 426, 427 (2nd Cir. 1928). Therefore, section 1983 actions seeking to enforce constitutional rights of due process and equal protection must be viewed as actions at law and the Seventh Amendment mandates a jury trial.

The trial judge based the dismissal of damages against the University and all officials in their official capacity on the Eleventh Amendment. It dismissed the damages remedy against Respondent Lukermann in his individual capacity on causation and qualified immunity. Appendix at A-23. The interposition of an immunities defense does not, however, alter the nature of the remedy sought. *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 479 (1962). Plaintiff was still entitled to a jury trial because his complaint sought legal relief.

The trial court decided that Respondent Lukermann could not, as a matter of law, have caused the deprivation because he was not the final decision-maker. This determination is contrary to the express language of Section 1983, to-wit:

"Every person who . . . subjects or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the constitution and law, shall be liable to the party injured in an action at law, suit in equity . . ."

Respondent Lukermann caused petitioner to be subjected to a deprivation of due process in two ways: 1) his notice failed to identify *any* specific charges or give any detailed reasons; and 2) his mobilization of political pressure on the decision makers to reverse themselves.

Whether the defective "notice" or the mobilization of political pressure was intentional or merely negligent, a cause of action was stated. See, *Parratt v. Taylor,* 451 U.S. 527 (1981).

Although the trial court concluded, without stating any reasons, that "additionally, Lukermann enjoys qualified immunity . . .", Appendix at A-23, the respondent did not claim that the law requiring notice or prohibiting political pressure was anything but clearly established. The Eighth Circuit did not comment on the issue of qualified immunity. It summarized the dismissal of damages as follows:

> "The District Court dismissed the damage claim against Lukermann individually because it concluded the claimed injuries could not have been caused by Lukermann.

By finding harmless error on the damages dismissal, the Eighth Circuit implicitly adopted this rule of causation. It is in conflict with the decisions in other Circuits which have held that constitutional deprivations are not limited to the final decision makers. *Briggs v. Malley*, 748 F.2d 716 (1st Cir. 1984) cert. granted 53 U.S.L.W. 3838 (1985) ("but for" the wrongful acts of the deputy seeking a search warrant, the deprivation, finally decided by the magistrate would not have occurred) and *Professional Association of College Education v. El Paso City Community College*, 730 F.2d 258, 266 (5th Cir. 1984) (causation is a question of fact for the jury).

The trial court herein denied Respondent's motion for summary judgment as to Respondent Lukermann. Since Rule 56 mandates that a court grant summary judgment if there are no material questions of fact, the denial clearly implies that questions of fact existed at the time of trial. These should have been questions for the jury.

If the trial court's rule of causation or automatic qualified immunity is allowed to stand, then state officials can claim that their conduct is insulated by the decision of the final decision makers. They would thus be free to act, with impugnity, towards their subordinates.

2. The Decision of the Eighth Circuit Conflicts with the Decisions in the Other Circuits on the Standard of Review for a Denial of a Jury Trial.

In the Fifth Circuit, a denial of a jury trial is reversible error if there were any factual disputes. *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 752 (5th Cir. 1983). In the Eighth Circuit, a denial of a jury trial is deemed harmless error even if question of fact existed at the time of trial and at the end of plaintiff's case. *King v. University of Minnesota*, 774 F.2d 224, 229 (8th Cir. 1985).

The trial judge did not dismiss plaintiff's claim, nor direct a verdict. The trial judge decided the case on the merits and entered judgment on the *merits*. The Appellate Court affirmed on the *merits*. Nevertheless, the Eighth

Circuit concluded that a jury denial was harmless error because it found that the trial court *could* have directed a verdict. Once disputed facts are resolved, any appellate court can second guess what *could* have been granted. The standard of hypothetical decisions, based on hindsight, can be used to justify any result. This court has recognized the defect in hindsight-based reasoning. *Mitchell v. Forsythe,* 53 U.S.L.W. 4798 (1985). Everything falls in place, once the factual disputes are resolved. This standard of review is inadequate for ordinary errors. When the error affects a right as fundamental as trial by jury it is prejudicial. Denial of a jury right simply cannot be harmless. Assuming arguendo that the damages dismissal was proper, it was nonetheless prejudicial error to strike the jury because liability is a question of fact for the jury. See concurring opinion of Justice Stevens in *Novack Investment Co. v. Setser,* cert. denied, 454 U.S., 1064 (1981).

The Eighth Circuit cited *Laskaris v. Thornbough,* 733 F.2d 260 (3rd Cir. 1983) as precedent for its decision. *Laskaris* does not apply, however, because in that case the trial court had, in fact, granted a motion for a directed verdict. It found that there were no fact questions existing at the end of the plaintiff's case.

In this case, however, the trial court's denial of the motion to dismiss plaintiff's claims and its resolution on the merits recognized the existence of fact questions and resolved the factual disputes on the merits. Once, an alleged abuse of power has survived the qualified immunity threshold and summary judgment, it should be decided by a jury.

If this standard of review is allowed to stand, the denial of a jury will be harmless error for a defendant as well as a plaintiff because the court could have directed a verdict. It is too late to close the door after the horse is out of the barn. Under Rule 56, the trial court was obligated to grant summary judgment if there were no genuine issues of material fact. It did not. Under Rule 41 (b), it was obligated to grant a dismissal, if based on the facts and law, plaintiff was not entitled to relief. It did not.

"The Seventh Amendment guarantees the right of jury trial to litigants in the Federal Courts. In view of the constitutional guarantee and the mandatory language of Rule 38, appellate courts will not affirm a wrongful denial of a jury trial unless convinced in the record that the trial judge's conclusion as to the sufficiency of the evidence to take the case to the jury was not the result of a resolution of conflicting testimony." Barron and Holtzoff, *Federal Practice and Procedure* (Wright ed.) §1354. 1, pp. 451-453. In the instant case, the trial court implicitly resolved conflicting testimony when it decided the case on its merits.

Hypothetical hindsight is simply an improper standard of review for errors affecting fundamental rights.

Black citizens are not limited to Title VII rights and remedies in their efforts to enforce their rights. The equal protection clause guarantees the same rights to due process as white citizens. [The Eighth Circuit mistakenly stated that "petitioner was the only black full professor ever terminated." It should have stated that the only full professor ever terminated at the University of Minnesota was black. One other professor, of a lesser rank, received one year of "probation" before termination. He was white.]

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) this Court did not remove a victim's opportunity to prove that an official's use of power, clothed under authority of law, was objectively unreasonable. It merely stated that "*bare* allegations will no longer suffice" and that "government officials are *generally* shielded from liability for civil damages." *Id* at 817-818. Respondent Lukermann had no duty to seek reversal of the Board's decision not to fire plaintiff. It was not within the scope of his duty to secretly convene a meeting with other professors and to indirectly pressure the Regents into a reversal. "If the law was clearly established, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald, supra* at 818-19. The Eighth Circuit chose not to "recount the

exhaustive procedural protections afforded the [petitioner]." Appendix at A-8. Those procedures were nullified, however, by the political pressure indirectly orchestrated by Respondent Lukermann. Since the trial court denied him summary judgment, the objective reasonableness of his actions, *Davis v. Scherer*, 82 L.Ed.2d 139, 147 (1984), should have been a question of fact for a jury.

In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Harlow v. Fitzgerald, supra* at 814. If the analysis of the district court and hindsight review of the Eighth Circuit are permitted to stand, all practical restraints on the abuse of power are removed. The entity and final decision makers are immune under the Eleventh Amendment. Officials who initiate, participate and pressure the final decision makers are deemed incapable, as a matter of law, of causing the deprivation. Under these conditions, University officials and other faculty have absolutely no fear of personal liability. In their official capacity, neither they nor the University would have any exposure for compensatory damages. *See, Owen v. City of Independence*, 445 U.S. 622 (1980). If the University faced only the prospect of an injunctive order, [it] would have little incentive to shun practices of dubious legality." *See, Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975).

Section 1983 was intended to create a "species of tort liability." Tort actions were traditionally tried to a jury. The dismissal of damages as a procedural device for getting rid of juries should not be approved. There is a strong tendency for a federal judge to limit the right to jury trials. This attitude has permeated legal disputes about judicial authority including due process claims of a right to jury trial, motions for new trials, JNOV, and directed verdicts. The trial judge, the Honorable Edward J. Devitt, a respected jurist and eminent scholar, has publically expressed his disfavor of jury trials in civil cases. 47 J. Air and Maritime Law 495 (Spring 1982).

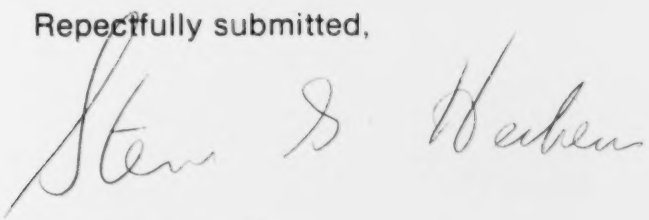
If this court sustains the procedural device of dismissing damages as a ground for denial of a jury, then parties will lose the only anchor against abuses of power. See, 3 *Writings of Thomas Jefferson* (Washington Ed.) 71.

There is simply no policy justification for removing government officials from scrutiny by juries merely because they are university officials. The power to remove a freehold, e.g. in a tenured position, is still subject to misuse and abuse.

CONCLUSION

The writ of certiorari should be granted.

Repectfully submitted,



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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 84-5131-MN

George D. King,

Appellant,

vs.

The University of Minnesota, et al.,

Appellees.

Appeal from the United States District Court for the District of Minnesota

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Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

November 6, 1985

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 84-5131

George D. King,

Appellant,

v.

The University of Minnesota, and the Board of Regents; Verne Long, Wenda Moore, Wally Hilke, Charles Casey, William Dosland, Erwin Goldfine, Lauris Krenik, David Lebedoff, Charles McGuiggan, David Roe, Mary Schertler, and Willis Drake, all in their capacity as Regents; the University of Minnesota and C. Peter Magrath in his capacity as President of the University of Minnesota; and Fred Lukermann, individually, and in his capacity as Dean of the College of Liberal Arts,

Appellees.

Submitted: March 26, 1985
Filed: September 25, 1985

Before McMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

George D. King brought this action under 42 U.S.C. §§ 1981 and 1983 against the University of Minnesota, and against the Board of Regents, the President, and the Dean of the College of Liberal Arts of the University of Minnesota, alleging that his termination as a tenured professor violated his constitutional rights. Following a bench trial, the District Court[1] granted judgment for defendants. King appeals, claiming that the District Court (1) erred in finding that he had received due process, (2) erred in allocating the burdens of proof with respect to his equal protection claim, (3) erred in dismissing his damage claims, and (4) erred in striking his demand for a jury trial. We affirm, holding that the District Court properly could have directed a verdict for defendants on each of King's claims. We further hold that because the District court could have directed a verdict on each of King's claims, any error in dismissing King's damage claims, or in striking King's demand for a jury trial, was harmless.

I.

King was hired by the University of Minnesota in 1970 as a full professor in the College of Liberal Arts, with a tenured appointment in the Department of Afro-American Studies (the Department).[2] He became the chairman of the Department in 1970 and served until 1974, when he was asked to step down as chairman by his colleagues and by the Dean.

[1]The Honorable Edward C. Devitt, Senior United States District Judge for the District of Minnesota.

[2]The Department later became the Department of Afro-American and African Studies.

The record reveals that from 1974 until his termination, there were complaints about King's performance by students, by colleagues, and by the successive chairmen of the Department. The complaints concerned poor teaching performance, excessive unexcused absences from class, absences from faculty meetings, low enrollment in his classes, undocumented research, and other matters.

Because of the perceived problems with his performance, King was recommended for a merit salary increase in only one year — 1979. The chairman of the Department indicated that the 1979 increase was not really a merit increase, but only an acknowledgment that the problems with King had abated in that year. In other years, King was not recommended for merit increases. In 1980, for example, Geneva Southall, the chairman of the Department, gave King the following merit evaluation:

> Having therefore, continued to be only a negative to the [Department], again I must recommend that Professor King be given no merit increase with the hope that the College will in its departmental response, further emphasize to Professor King its disappointment that he has failed to be the historian/teacher that his inflated salary and professional rank warrants.

Trial Transcript at 1476.

In the 1980-81 school year, the Department was under the direction of a new chairman, Earl Scott. During the course of his first year as chairman, Scott became concerned by King's numerous unexcused absences from his classes and by his lack of participation in Department governance. Scott communicated with King and with Fred Lukermann, Dean of the College of Liberal Arts, concerning King's inadequacies as a faculty member.

Concerned that the University was not addressing the Department's problems with King, in February 1982 Scott, Southall, and two other members of the Department wrote to Dean Lukermann about the Department's personnel problems and the Dean's failure to remove uncooperative and unproductive members.

Lukermann wrote to King on February 24, 1982, admonished King about his inadequate performance in teaching, research, and service, and questioned King's competence in carrying out his duties, as well as his usefulness to the Department and to the University. On the same day, Lukermann also wrote to the chairman of the Department, with a copy to King, setting forth his dissatisfaction with King's performance and asking the Department to review these matters.

On March 12, 1982, the Department of Afro-American and African Studies met and, after a lengthy discussion with King present, voted 9-2 (with one abstention) to remove King from the Department because of his long history of disservice to the Department. Following this vote, Lukermann communicated several more times with King, but apparently was unable to satisfy himself that King was willing to improve his performance.

On February 15, 1983 Lukermann sent a letter to King initiating removal proceedings under the University of Minnesota's Regulations Concerning Faculty Tenure (Tenure Code), and giving King notice of the charges against him. In his letter Dean Lukermann referred to other communications with King that contained specific statements of dissatisfaction with King's performance as a professor.

On March 10, 1983 King requested a hearing before the Senate Judicial Committee. The Senate Judicial Committee is a group of faculty members appointed by the University of Minnesota Faculty Senate to hear faculty complaints under the Tenure Code. A panel of faculty members was appointed to hear the case in March 1983. King's counsel objected to one of the members of the panel. That member was replaced. The panel members were all tenured faculty from outside the College of Liberal Arts.

Prior to the Senate hearing, King was represented by counsel and was allowed substantial documentary discovery. King's attorney took the depositions of Lukermann, Scott, and former Dean Frank Sorauf. On May 26, 1983, a prehearing conference was held at which the

parties exchanged issue lists, witness lists, and exhibit lists. On May 27, 1983, the Panel issued a prehearing conference order, which specified a number of issues pertaining to the upcoming hearing. Both sides submitted objections to the prehearing conference order. The objections were ruled on by the panel prior to the hearing.

The Senate Judicial Committee hearing was held from June 4 to June 17, 1983. King was represented by counsel. King's counsel cross-examined witnesses, presented witnesses and documentary evidence on King's behalf, and made both oral and written arguments. King did not testify at the hearing. On September 15, 1983, the panel issued its Final Findings and Recommendations, in which it recommended that King be terminated for cause under the Tenure Code.[3] As provided by the Tenure Code, the findings and recommedations were sent to the President of the University for review.

On October 27, 1983, after another round of briefing, C. Peter Magrath, President of the University, reviewed the Findings and Recommendations and recommended to the Regents of the University of Minnesota that King be terminated.

The Regents were to consider the King matter at their December 8, 1983 meeting. Prior to the Regents's meeting, each Regent was sent the panel's findings, the President's recommendation letter, and briefs from each of the parties. The transcript of the panel hearing and the exhibits presented to the panel were available to the Regents. On December 8, 1983, the Regents heard arguments from counsel. King introduced new affidavits in support of his position and also addressed the Regents. After argument, the Regents went into closed session. The Regents adopted the findings of the Senate Judicial Committee, but did not terminate King. Instead, the Regents voted 7-2 to place King on probation for a year.

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[3]Cause for termination under the Tenure Code consists of such cause as seriously interferes with the person's capacity competently to perform his duties, or seriously interferes with his usefulness to the University. *See* Appendix at 27.

On December 14, 1983, Magrath wrote to the Regents asking them to rescind their action, claiming that the affidavits submitted by King at the Regents meeting contained misleading information, and that the decision of the Regents was contrary to the findings which were adopted. Magrath argued that this inconsistency made it difficult to ascertain or maintain any standard of performance for faculty at the University. A copy of this letter was sent to King.

The Regents indicated that a hearing would be held to consider the rescission request. Each of the parties again sent briefs to the Regents prior to the hearing. In addition, a number of faculty and community members wrote to the Regents expressing their views concerning the Regents' decision to place King on probation.

On January 12, 1984, the Regents met to consider the rescission request. They again heard arguments from counsel. King again spoke on his own behalf, as did a minister who asked the Regents not to rescind their previous action. The Regents voted in public session to rescind their previous action. The Regents then went into closed session, where they voted 8-4 to terminate King for cause.

II.

King initially contends that he was not accorded substantive due process, that is, he asserts that there is not substantial evidence supporting the decision for the University to terminate him for cause. It is, of course, not for the District Court or for this Court to determine *de novo* whether we would terminate King based on the evidence presented during the hearings afforded King by the University. Nor does the District Court or this Court sit in review of the determination by the University of Minnesota to terminate King as we would review a determination by an administrative agency. Rather, it was King's burden in this case to prove in the District Court that he was dismissed

without being afforded procedural due process[4] or that he was dismissed for a constitutionally impermissible reason.[5] *Cf. Perry v. Sindermann*, 408 U.S. 593, 598 (1972); *Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 264-65 (5th Cir.), *cert. denied*, 105 S. Ct. 248 (1984).

III.

King contends that he was not accorded sufficient procedural due process by the University in connection with his dismissal. In *Brouilette v. Board of Directors of Merged Area IX*, 519 F.2d 126 (8th Cir. 1975), this Court outlined the requirements of due process in a similar case:

1) clear and actual notice of the reasons for termination in sufficient detail to enable him or her to present evidence relating to them;
2) notice of both the names of those who have made allegations against the teacher and the specific nature and factual basis for the charges;
3) a reasonable time and opportunity to present testimony in his or here own defense; and
4) a hearing before an impartial board or tribunal.

Id. at 128.

We will not here again recount the exhaustive procedural protections King was afforded, but merely hold that on the basis of uncontradicted evidence adduced at trial, the District Court properly could have directed a

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[4]King was a tenured professor. Defendants do not dispute that King had a protectible interest in continued employment and was therefore entitled to procedural due process. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

[5]The state may, of course, not dismiss an employee for a constitutionally impermissible reason, whether or not the employee has a protectible interest in continued employment. *See Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972).

verdict for defendants on this claim had the case been tried before a jury. We are satisfied that King received the process he was due.

IV.

King's next claim against the defendants is that he was subjected to disparate treatment, that is, terminated, on the basis of his race. The District Court rejected King's contention as wholly unsupported. King's counsel argues in his brief on appeal that King made out a prima facie case of racial discrimination, and that the District Court thereafter erred in not shifting the burden of proof to defendants. Defendants respond in their brief, citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981), and *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541 (8th Cir.), *cert. denied*, 105 S. Ct. 112, 1194 (1984), for the proposition that:

> [t]he order and burdens of proof laid down by the Supreme Court for Title VII cases apply also to cases of race and sex discrimination in employment brought under 42 U.S.C. §§ 1981 and 1983. The burden of proof remains at all times on the plaintiff.

Id. at 545 (citations omitted). In his reply brief, King's counsel reasserts that the burden of proof in this case should have been shifted to defendants.[6]

We need not reach King's burden of proof claim because an examination of the instant case reveals that King failed to establish a prima facie case of discrimination. There was simply no evidence presented from which a discriminatory motive on the part of defendants in terminating King's employment properly could have been inferred.[7]

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[6]King's counsel seeks to distinguish *Goodwin* on the basis that, while the rule of law announced in *Goodwin* applies to race and sex discrimination cases, *Goodwin* itself was only a sex discrimination case. King's counsel does not discuss *Burdine* which, while a Title VII case, persuasively discusses the allocation of the burden of proof in cases involving disparate treatment.

V.

King also alleged before the District Court that he had made controversial statements in one of his classes and that he was dismissed on the basis of these statements in violation of his First Amendment rights. King does not here contest the finding of the trial court that he adduced absolutely no evidence that anyone involved with his termination was ever aware of any of his in-class statements; we note that the District Court properly could have directed a verdict for defendants on this claim had the case been tried before a jury.

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[7]King's evidence of purposeful racial discrimination consisted of 1) the fact that he was the only black full professor ever terminated at the University of Minnesota; 2) a query by a faculty panel member, in the course of determining who was attending King's hearing before the faculty panel, as to whether a woman at the hearing whose name was King (who was white) was his wife; 3) a statement by the Dean of the College that he believed that race depended not on skin color but on genotype; 4) speculation by a former chairman of the Afro-American and African Studies Department that some white members of the faculty might not have been terminated had they performed as badly as King (although King had, in her opinion, repeatedly failed to maintain a minimum level of performance); 5)the fact that a Regent, in speaking during the hearing to a minister and his group of 1200 petitioners, many of whom were black, referred to the minister's group as "your people"; and 6) the following statistics on the percentage of blacks in the following populations: University of Minnesota Academic Appointments—1.4%; University of Minnesota Faculty—0.8%; University of Minnesota College of Liberal Arts Faculty—1.8%; University of Minnesota College of Liberal Arts Students—1.7%. Approximately 1.3% of the population of the State of Minnesota is black. *See* United States Bureau of the Census, *Statistiscal Abstract of the United States: 1985* 36 (105th ed. 1984) (figure derived from the 1980 census).

VI.

King's final contention is that the District Court improperly dismissed his damage claims,[8] and thereafter erred in concluding that since the only relief remaining that could be awarded was injunctive or declaratory in nature, he was not entitled to a jury trial.

We do not reach the merits of King's contention that his damage claims were improperly struck or his contention that he was entitled to a jury trial. We merely note that in light of our determination that a directed verdict could have been entered against King on all of his claims, the dismissal of his claim for damages was, at most, harmless error. We further note that since King would not have been denied his constitutional right to a jury trial had the District Court simply entered a directed verdict for defendants, *Galloway v. United States*, 319 U.S 372, 389-96 (1943), the failure of the District Court to grant King a jury trial in the present case was also, at most, harmless error. *Laskaris v. Thornburgh*, 733 F.2d 260, 264, 266 (3rd Cir.), *cert. denied*, 105 S. Ct. 260 (1984).

The judgment of the District Court is affirmed.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[8]The District Court dismissed the damage claims against the University of Minnesota and against those defendants who were acting in their official capacities on the ground that such damages were barred by the Eleventh Amendment. The District Court dismissed the damage claim agaist Lukermann individually because it concluded the claimed injuries could not have been caused by Lukermann.

UNITED STATES DISTRCT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

George D. King,

Plaintiff,

v.

The University of Minnesota, and the Board of Regents; Verne Long, Wenda Moore, Wally Hilke, Charles Casey, William Dosland, Erwin Goldfine, Lauris Krenik, David Lebedoff, Charles McGuiggan, David Roe, Mary Shertler, and Willis Drake, all in their capacity as Regents; the University of Minnesota and C. Peter Magrath in his capacity as President of the University of Minnesota; and Fred Lukermann, individually, and in his capacity as Dean of the College of Liberal Arts,

Defendants.

Civ. 3-83-604

Steve G. Heikens, Esq., Popham, Haik, Schnobrich, Kaufman & Doty, Ltd., for plaintiff.

William P. Donohue, Esq. and Bonita F. Sindelir, Esq., Associated University Attorneys, for defendants.

The issue in this civil rights case brought by a tenured professor against the University of Minnesota, members of its Board of Regents, and two of its administrators is whether plaintiff's constitutional rights were violated in his removal from the faculty for cause. Plaintiff, a black professor in the University's Department of Afro-American and African Studies since 1970, alleges in an amended complaint filed on May 25, 1983, that defendants violated his due process, equal protection and First Amedment rights in removing him. He brings this action under 42 U.S. § 1983 seeking reinstatement to the faculty of the University of Minnesota. Defendants deny wrongful discharge of plaintiff.

The regulations concerning faculty tenure at the University of Minnesota authorize removal for causes which "seriously interfere with the person's capacity competently to perform his duties, or with his usefulness to the University." Tenure Code, § 11. Termination proceedings against a tenured faculty member may be initiated only by the dean of the college that embraces the member's department. Final authority to discharge tenured faculty rests solely with the Board of Regents.

Following a lengthly period which plaintiff's peers and superiors viewed as one of unsatisfactory service and as cause for removal, Fred L. Lukermann, Dean of the College of Liberal Arts, initiated removal proceedings against plaintiff. Plaintiff requested a hearing in accordance with the tenure code. Under the University's established procedures for peer review, a three-person hearing panel of University faculty members was appointed by the

Judicial Committee of the University Faculty Senate and accepted by the parties. The faculty panel held hearings for eight days and made Final Findings and Recommendations dated September 15, 1983. On the basis of the hearing record, the faculty panel unanimously recommended that Professor King be removed for cause, stating:

> The facts justify removal for cause because the facts show a serious interference with Professor King's usefulness to the University.

University President C. Peter Magrath, after studying the hearing record and briefs of the parties, concurred. On October 27, 1983, the president recommended to the Board of Regents that the panel findings and recommendation be adopted.

On December 8, 1983, the Board of Regents accepted the panel's findings that Professor King's poor performance seriously interfered with his usefulness to the University within the meaning of Section 11 of the tenure code but placed plaintiff on probation for one year rather than terminate him.

President Magrath, by letter dated December 14, 1983, asked the Board of Regents to rescind its action placing plaintiff on probation and to terminate him as recommended by the faculty panel. The Board met on January 12, 1984, and, in light of the panel findings and considering further comment on the matter, including statements favorable to plaintiff, rescinded its earlier decision and terminated plaintiff for cause. This action followed.

The issues were fully tried to the court for nine days from May 14, 1984 to June 1, 1984. Twenty-four witnesses testified.

It is clear from the evidence adduced at trial that plaintiff's claim that his constitutional rights were violated by his removal is groundless. The findings of the faculty panel adopted by the Board of Regents, are fully supported by substantial evidence in the record and are not arbitrary or capricious. Procedural and substantive due process was accorded plaintiff at every stage of the termination proceedings. He was represented by competent counsel,

afforded notice of the charges against him and of the witnesses who were to testify against him. He was given reasonable time and a meaningful opportunity to be heard before an impartial panel of his peers. The Board of Regents was impartial and based its decisions on the evidence in the record before it. Finally, it is clear that plaintiff was not discriminated against because of his race nor was terminated in retaliation for exercising First Amendment rights.

The Board of Regents acted permissibly in adopting the findings and recommendation of the faculty panel that plaintiff's unsatisfactory teaching performance seriously interfered with his usefulness to the University and should be removed. Specifically, the panel found that plaintiff was frequently absent from, or tardy for, classes, failed to adhere to announced office hours and his teaching was of poor quality. It found that plaintiff followed inappropriate examination and grading practices, such as permitting a department secretary to conduct examinations. It found that plaintiff's conduct resulted in inordinately low registration in his classes and that this adversely affected the department's budget and goal to encourage majors in the field. The panel received evidence showing that only six out of 22 students in one of plaintiff's classes received a grade in the course and that students complained that a teaching assistant substituted for plaintiff "much of the time." There was evidence that plaintiff was absent from 35% of his classes. It also found that Professor King was often ill-prepared for class, that his lectures were disorganized and often irrelevant to the designated topic and that he frequently failed to make course requirements clear to students.

The findings of the panel reflected that Professor King was engaged in extensive private consulting activities. Concern was expressed on several occasions by colleagues and two successive chairpersons of the department that plaintiff's outside consulting work was taking too much time away from his teaching.

The panel also made extensive findings concerning plaintiff's unwillingness and uncooperativeness in helping

the department develop its curriculum and in providing help in departmental governance. His attendance at faculty meetings was sporadic and at times he refused to attend meetings or left prematurely. Faculty members felt strongly enough about Professor King's conduct that they took a formal vote in March 1982 to remove him from the department (nine yes, two no, one abstension). The majority of the members of the faculty were black.

Plaintiff's conduct was characterized by the panel as "remarkably casual or even cavalier" in meeting his teaching and departmental responsibilities over a long period of time. His poor teaching practices and absences from, and tardiness in, class attendance occasioned criticism and requests for better performance from his students, associates and superiors. Professor King failed to respond to these requests. Two successive department chairpersons, both black, and the dean of his college requested in writing that he respond to complaints and criticism, and correct his conduct, but such requests were ignored. He offered no explanation of his failure to respond. Plaintiff chose not to testify before the faculty panel to explain or defend his conduct.

The panel properly concluded that the evidence established a pattern of academic irresponsibility and that the overall impact of Professor King's influence in the Department of Afro-American and African Studies was negative, rather than positive or even neutral.

At trial, plaintiff contended the panel's findings were improperly based on a significant amount of hearsay evidence rather than live witness testimony. The rules and practice of the University Senate Judicial Committee allow faculty panels to consider such evidence although its weight may be diminished. In any event, the reliability of the hearsay evidence presented at the hearing was established by its repeated corroboration by other evidence. The panel acted fairly and in accordance with all applicable rules of procedure in its consideration of matters relative to plaintiff.

Plaintiff emphasized at trial that some complaints voiced at the hearing were misunderstood by the panel and

other complaints were incorrect or inaccurate, He did not, however, testify before the panel to tell his view of the charges against him. Although plaintiff introduced favorable evidence at trial through the testimony of four former students, he failed to show that complaints concerning his overall teaching performance were in fact unfounded. Substantial evidence produced at trial strongly supports the panel's findings. This came from many witnesses, including one called by plaintiff, Professor Geneva Southall, former chair of the department from 1974-1978. She confirmed the panel's findings regarding plaintiff's absenteeism and other inadequate performance. She conceded that plaintiff's usefulness to the department reached "a point of no return" by 1983 but her view was that the University had an obligation not to terminate tenured faculty but to place them somewhere in the institution where they could function usefully. She was asked, but could offer no suggestion as to where plaintiff might function usefully within the University.

Plaintiff sought to show at trial that Dean Lukermann was unfair in his treatment of, and initiation of removel proceedings against him. But the evidence did not show that to be the case. Lukermann had reviewed plaintiff's personnel file which showed written complaints from students about Dr. King's absenteism and teaching practices. It reflected complaints from Department Chairs Geneva Southall and Earl Scott, both black, about Professor King's inadequate teaching and research performance and his absenteeism. Faculty members of the Department, both black and white, urged Lukermann to take action with respect to plaintiff. The faculty had expressed itself by a substantial vote to remove plaintiff from the Department. Department Chairman Scott even threatened to resign unless Dean Lukermann took positive action against plaintiff. Before initiating proceedings of removal, Lukermann had talked with and written plaitiff warning of his inadequate performance. It is clear that Dean Lukermann acted in good faith. He was motivated by plaintiff's long record of poor teaching, absenteeism and lack of response to criticism, and not by personal

animosity, racial prejudice or unfairness. The faculty panel expressed the opinion that Dean Lukermann could have been charged with administrative negligence had he not taken action.

Differing statistics were offered by each side pertaining to the percentage of blacks in Minnesota and the percentage on the faculty compared to the student body in an effort to show, or to negative, their statistical significance. The court is satisfied the statistics do not make out a prima facie case for plaintiff, but even if they did, defendants have clearly and convincingly proved that plaintiff was terminated for non-discriminatory reasons.

Plaintiff's claim that he was terminated because of his race is wholly unsupported. He testified before the court that he believed his race was a motivating factor in his discharge because no other consideration could explain his treatment. Professor Southall was the only other witness at trial who testified to a suspicion that plaintiff's race was a factor in his termination. She based her opinion on her experience as a black woman — that "blacks must be twice as good as whites" to maintain their positions. She believed that the University treated the Department of Afro-American and African Studies differently than predominantly white departments in the areas of department governance (i.e., adjunct professors were given full voting power in the department) and budget matters.

Even if Professor Southall's suspicion was confirmed at trial, which it was not, the issue here is whether plaintiff was discharged because of his race. The facts show he was removed because of his inadequate performance, and even Professor Southall testified as to that. She said the department sought to elicit from plaintiff only a minimum level of performance and that he repeatedly failed to meet it. She supported his removal from the department as did other black faculty members.

No evidence was presented at trial to support plaintiff's claim that members of the Board of Regents were improperly influenced by Dean Lukermann or President Magrath. There was no showing that any Regent was

lobbied by Dean Lukermann or President Magrath through ex parte communication. President Magrath requested the Board of Regents to rescind its probation decision and to remove plaintiff. As chief administrative officer of the University, he acted within his authority and, according to his letter of December 14, 1983 to the Regents, was prompted by the Regents "will undermine seriously the ability of the University to set and enforce minimum standards of faculty performance."

Similarly, there was no showing that the Regents acted other than properly in voting to terminate plaintiff. Confirmation that the Board acted only on the basis of the record and recommendation of the faculty panel, and not because of race, was offered by Regent Wenda Moore, a former long-time chairperson of the board. She testified that, although she voted to place plaintiff on probation, she believed that fellow regents who voted for removal did so because of their honest conviction that the record before the faculty panel called for that action and not for any improper reason. Regent Moore is black.

Finally, there was no evidence that plaintiff's rights of speech were violated. If plaintiff spoke out against defendants on any subject for any reason, such was not known to defendants and was not a factor in their decision to terminate him.

Plaintiff's constitutional rights were not transgressed. He was given full and fair hearings before the faculty panel, the Board of Regents and the court, and the record clearly shows he was removed, not because of his race, but because he wasn't doing his duty.

These expressions are intended to satisfy the requirements of Federal Rules of Civil Procedure 52(a).

The clerk is directed to enter judgment for defendants.

Dated: June 15, 1984.

EDWARD J. DEVITT
United States District Judge

ADDENDUM

After trial, plaintiff's counsel objected to the agreed upon procedure followed in this bench tried case for the admission of all listed exhibits of both parties subject to objection. The objection is untimely and not well taken. In deciding the case, the court relied principally on the record made before the faculty panel and the Board of Regents, the testimony of witnesses at trial and exhibits used in connection with that testimony. It was guided by the law stated by the Court of Appeals in *Builders Steel Co. v. Commissioner of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950) and *Fields Engineering & Equipment v. Cargill, Inc.*, 651 F.2d 589,594 (8th Cir. 1981).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

GEORGE D. KING,

Plaintiff,

v.

THE UNIVERSITY OF MINNESOTA, et al.,

Defendant.

Civ. 3-83-604
MEMORANDUM & ORDER

Steve G. Heikens, Esq., Popham, Haik, Schnobrich, Kaufman & Doty, Ltd., for plaintiff.

Bonita F. Sindelir, Esq., and William P. Donohue, Esq., Associate University Attorneys, for defendants.

Before us are (1) defendants' motion for summary judgment on Counts One through Four which was taken under advisement on April 16, 1984; (2) plaintiff's request for a statement of the reasons underlying dismissal of the damage portions of the complaint; (3) defendants' request to strike plaintiff's jury demand; (4) plaintiff's request for reconsideration of the dismissal of his damage claims against defendant Fred Lukermann, individually; and (5) plaintiff's request for an advisory jury.

Summary Judgment

On April 16, 1984, defendants' motion for summary judgment was heard, argued, granted in part, and taken

under advisement as to Counts One through Four pending the parties' submission of a joint statement of disputed and undisputed facts. Counsel were unable to distill their versions of the facts into one document but submitted instead two separate statements to which opposing counsel indicated specific agreement or disagreement.

Our review of the statements, together with all materials, memoranda and argument proffered in regard to defendants' motion for summary judgment, reveals that summary judgment on Counts One through Four would be premature. We reach this conclusion largely because plaintiff challenges the motive and intent of defendants. Summary judgment is inappropriate where dominant issues concern motive, intent or other subject feelings. *McGee v. Hester*, 724 F.2d 89, 91 (8th Cir. 1983).

Regarding the trial of this case, we note that the claimed due process violations enumerated in Count One allegedly occurred prior to the administrative hearings and proceedings addressed in Count Two. In the course of the administrative hearings and termination proceedings, plaintiff was heard on the propriety of the actions stated in Count One but his claims were found to be unfounded. It appears that unless plaintiff prevails at trial on Count Two, in which he claims the termination process and determination violated his due process rights, he cannot prevail on Count One. Accordingly, in the interest of economy of time for parties and the court, trial should be limited in the first instance to Counts Two, Three and Four. The court will entertain post-trial motions relating to Count One and, if necessary, will take additional evidence.

Damage Claims

Plaintiff's claims for monetary damages were dismissed as to all defendatns, in their official capacities, on the grounds of sovereign immunity. The University is an instrumentality of the State of Minnesota, and monetary awards against it or its governing body, the Board of Regents, would be paid by the state treasury. *See, e.g. Agarwal v. Regents of the University of Minnesota*, Civ. No.

3-81-131, Memorandum and Order (D. Minn. 1982) *Walstad v. University of Minnesota Hospitals*, 442 F.2d 634 (8th Cir. 1971). *But see Durham v. Parks*, Civ. No. 4-82-862, Order (D. Minn. 1983) (Lord, J.). Similarly, monetary awards against defendants for acts committed in their official capacities would be paid by the state treasury. Because the University has not consented to suit in this case, plaintiff's claims for damages against these defendants are barred by the Eleventh Amendment. *See Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974).

Regarding dismissal of the damage claims against defendant Fred Lukermann, individually, the claimed injuries could not have been caused by him. It is undisputed the Lukermann had authority only to initiate termination proceedings against plaintiff. He was without power to deprive plaintiff of any constitutionally protected interests since he could only recommend that certain actions against plaintiff be taken. Additionally, Lukermann enjoys qualified immunity from monetary damage awards under *Harlow v. Fitzgerald*, __U.S.__, *102 S.Ct. 2727 (1982).*

Jury Entitlement

In light of the dismissal of plaintiff's claims for damages defendants request that plaintiff's jury demand be striken and the claims for injunctive and declaratory relief be tried to the court. Plaintiff objects to a court trial on the grounds that he sought both legal and equitable relief in his complaint and, therefore, he is entitled under the Seventh Amendment to a jury determination on all factual issues bearing on liability. Plaintiff cites no authority which supports this proposition nor are we aware of any.

Fact issues are not inherently legal or equitable, but "like chameleons [they] take their color from surrounding circumstances." *Ross v. Bernard*, 396 U.S. 531, 551, 90 S.Ct. 733, 744 (1970) (Stewart, J. dissenting). The Seventh Amendment preserves the right to trial by jury only for actions which are legal in nature. *E.g., Curtis v. Loether*, 415 U.S. 189, 193-94, 94 S.Ct. 1005, 1007-08 (1974). As the parties correctly note, an action is determined to be legal or equitable principally by the nature of the relief sought.

Here, the complaint now encompasses only claims for injunctive and declaratory relief. Both remedies are historically equitable in nature. *See, e.g., Curtis v. Loether, id.*, 415 U.S. at 193-94; Simber v. Conner, 372 U.S. 221, 22-23 (1963). Additionally, plaintiff does not argue that these claims are traditionally entertained in actions at law. In fact, they are not. While the right to trial by jury should be liberally construed, plaintiff should not be allowed to obtain a jury trial simply by including in his complaint claims for monetary relief to which, as a matter of law, he is not entitled.

Plaintiff's jury demand is striken and the issues will be tried to the court.

Reconsideration

We have reconsidered our dismissal of the damage claim against defendant Fred Lukermann, in his individual capacity, and are statisfied it is an appropriate ruling.

Advisory Jury

Having considered plaintiff's request that an advisory jury hear the evidence presented in this court action, we think it wiser to proceed without an advisory jury.

Based on the foregoing analysis, and all files, records and proceedings,

IT IS ORDERED that:

1. Defendants' motion for summary judgment on Counts One through Four is DENIED. Trial in the first instance shall be limited to Counts Two, Three and Four. The court will entertain post-trial motions regarding Count One and, if necessary, will take additional evidence.

2. Defendants' request to strike plaintiff's jury deman is GRANTED.

3. The court's response to plaintiff's requests regarding dismissal of damage claims, reconsideration, and for an advisory jury trial is set forth herein.

Dated: May 14, 1984.

EDWARD J. DEWITT
United States District Judge

United States District Court
OF MINNESOTA
THIRD DIVISION

CV 3-83 604

George D. King,

Plaintiff,

vs.

University of Minnesota & the Board of Regents; Charles H. Casey; William B. Dosland; Erwin L. Goldfine, Lauris Krenik; David M. Lebedoff, Verne Long; Charles McGuiggan; Wende W. Moore; David K. Roe; Mary T. Schertler; Willis K. Drake, Wally Hilke; The University of Minnesota; Peter McGrath; Fred L. Lukermann,

Defendants.

Judge or Magistrate
EDWARD J. DEVITT

☐ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

That judgment is entered in favor of defendants.

June 15, 1984

Clerk: Francis E. Dosal
Deputy Clerk: Debra K. Forschen

Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1323

IN THE

Supreme Court of the United States

GEORGE D. KING,

Petitioner,

vs.

UNIVERSITY OF MINNESOTA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

No. 85-1323

GEORGE D. KING,

Petitioner,

vs.

UNIVERSITY OF MINNESOTA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES .

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

While petitioner has adequately presented the procedural history of the case, he has not presented fully or fairly the facts which underlie the Eighth Circuit's conclusion that a directed verdict could have been granted if a jury had been empaneled. While the facts are in large part set forth in the Eighth Circuit's opinion, the relevant facts will be briefly summarized.

Dr. King was hired by the University in 1970 as a full professor in the College of Liberal Arts at the University of Minnesota with a tenured appointment in the Afro-American Studies Department.[1] Petitioner was the chair of the department from 1970 to 1974, when all the members of his department except one asked him to step down as chair.

From 1974 to his termination, petitioner was employed as a faculty member in the department teaching four courses. Two of the courses were introductory and two of the courses were seminars.

Throughout the period from 1974 to his termination, there were numerous complaints about petitioner's performance by students, faculty, and the chair of the department. There were both oral and written complaints from students. While the complaints involved all areas of performance, excessive absenteeism was a consistent complaint.

During this same period, the introductory courses petitioner taught had chronically low enrollment. For example, from 1977 to 1982, the introductory courses petitioner taught averaged 12 students and 6 students respectively. In addition to petitioner's poor reputation as a teacher, these enrollments were also due, at least in part, to petitioner's practice of offering them repetitively and often out of sequence. Prior to petitioner's teaching, these same courses attracted 100 to 200 students.

Each year petitioner's performance was reviewed to determine a salary merit increase. His department uses a Merit Advisory System of three faculty members in the department to review the activity and performance of each person and to recommend increases to the chair. The chair then makes a written review and recommendation to the Dean.

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[1] Later renamed Afro-American and African Studies Department.

During the entire period, Dr. King was recommended for an increase in only one year, 1979-80. In that year the chair, Dr. Southall, indicated that the increase was not really a merit increase but an acknowledgement that Dr. King had no recorded absenteeism or student complaints in that year. In all other years, Dr. King's contributions in teaching, research and service were severely criticized by his colleagues and the departmental chair who recommended no merit increase.[2]

In subsequent years, petitioner's performance did not improve, provoking complaints from the departmental chair about low enrollments and his "failure to be the historian/teacher that his inflated salary and professorial rank warrants". *King v. University of Minnesota, et al.*, 774 F.2d 224, 225-226 (8th Cir. 1985).

Beginning in Fall, 1980, the department was under the direction of a new chair, Earl Scott, who almost immediately received student complaints about petitioner's performance and absence from class. In Spring, 1981, Dr. Scott actually monitored petitioner's class attendance. Petitioner was absent on several occasions and Dr. Scott had to dismiss petitioner's classes because of his absence.

Dr. Scott brought these matters to the attention of the Dean. In February, 1982, after getting no response from the Dean to this continuing problem, Dr. Scott and three other members of the department wrote to the Dean about their festering personnel problems and the Dean's failure to remove un-

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[2] In 1978, in response to a series of written complaints from students and from the departmental chair, the petitioner was required to meet with the Dean of the College. The Dean discussed with petitioner each of the student complaints and petitioner's responsibilities to the University and his students. The Dean warned the petitioner that if his performance did not improve, the College would consider taking serious measures, including a possible dismissal for cause.

cooperative and unproductive members. They asked for some clear action with respect to the petitioner.

In February, 1982, the Dean wrote to petitioner, warning him about his lack of performance in teaching, research and service, the lack of students in his courses, his refusal to cooperate in enhancing his courses and his lack of commitment to the department or the University. The Dean detailed his dissatisfaction and his perception of the department's dissatisfaction with petitioner's teaching performance and the declining enrollments in his courses. The Dean asked the department to review these matters.

On March 12, 1982, the departmental faculty voted 9-2 with one abstention to remove petitioner from the department because of his continuing unacceptable teaching, scholarship and service. During the next several months, the Dean asked the petitioner to take a series of actions to enhance his performance. At the end of fall quarter 1982, having heard nothing from the petitioner, the Dean investigated and found that Dr. King had not completed the requested actions.

Accordingly, on February 15, 1983, the Dean sent a letter to petitioner initiating removal proceedings under the Tenure Code and giving petitioner notice of the charges against him. In his letter, the Dean stated:

> Therefore with this letter and its carbon to President Magrath, I am initiating proceedings for your permanent removal for cause as of June 15, 1983. The patterns of repeated inaction on your part which lead me to take this action are raised in my letters of February 24, April 9, and June 10, all of 1982.

These earlier letters were specific statements of dissatisfaction with petitioner's teaching, enrollments, absences, failure to develop courses and lack of graduate faculty status.

Petitioner requested and was granted a hearing before the Senate Judicial Committee, which appointed a panel of three faculty members to hear the case. Prior to the hearing, petitioner was represented by counsel and was allowed substantial document discovery. Petitioner's attorney took the depositions of Dean Lukermann, Professor Scott and former Dean Sorauf prior to the internal hearing. Also prior to the hearing, there was an exchange of issue lists, witness lists, and exhibit lists.

The hearing was held for eight days, from June 4-17, 1983. Petitioner was present at the hearing and, through counsel, cross-examined witnesses, presented witnesses on his own behalf, presented documentary evidence, and made oral and written argument.

On September 15, 1983, the panel issued its Final Findings and Recommendations in which it unanimously recommended that petitioner be terminated for cause under the Tenure Code. In accordance with the Tenure Code, the Final Findings and Recommendations were sent to the President of the University for review. After submission of briefs by both sides, the University President reviewed the Final Findings and Recommendations and issued his recommendation to the Board of Regents. He agreed with the panel and recommended that petitioner be terminated.

The matter was considered by the Board of Regents of the University of Minnesota on December 8, 1983. Prior to that time, each of the parties had had an opportunity to send written arguments to the Board of Regents and the transcripts of the hearings and all exhibits introduced at the hearing were available to the Regents. At the meeting, petitioner's attorney argued on his behalf and submitted a series of new affidavits. After the arguments the Regents went into closed session and decided to adopt the panel's finding, but to place petitioner on probation for a year rather than terminate him.

On December 14, 1983, the University president wrote to the Regents asking them to rescind their actions. His reasons were that the additional affidavits submitted at the Regents' meeting were given inappropriate weight and the decision was contrary to the findings which were adopted. He argued that this inconsistency made it difficult to ascertain or maintain any standard of performance for petitioner's proposed probation or for the faculty as a whole. A copy of the letter was sent to petitioner and his attorney.

The parties were again allowed to brief this matter to the Regents and orally argue it to them. After hearing the arguments, the Regents voted to rescind their previous action and decided to terminate petitioner for cause effective January 15, 1984.

ARGUMENT

A. There Is No Important Undecided Question Of Federal Law In This Case.

Petitioner's first reason for granting the writ of certiorari is that this Court should decide "whether a federal judge has the authority to convert an action at law into a suit in equity." Petition at 5. This is not an appropriate basis for review for three reasons. First, the issue was never decided by the Eighth Circuit. Second, the issue is irrelevant since the Eighth Circuit held that the District Court could have granted a directed verdict, thus obviating the need for a jury. Third, the District Court did not convert this action from a suit at law to one in equity, rather, when it granted summary judgment on all the damage claims, it concluded that plaintiff no longer had a right to a jury trial. Pet. App. at 23-24.

In its opinion, the Eighth Circuit analyzed each of Petitioner's claims on the merits, concluding with respect to the due process and first amendment claims that the District Court "properly could have directed a verdict for defendants" and, with respect to his race discrimination claim, that petitioner had "failed to establish a *prima facie* case of discrimination." 774 F.2d at 228-229. With respect to petitioner's jury trial claim, the Eighth Circuit explicitly stated that it did not reach the issue, indicating as follows:

> We do not reach the merits of King's contention that his damage claims were improperly struck or his contention that he was entitled to a jury trial . . . We further note that since King would not have been denied his constitutional right to a jury trial had the District Court simply entered a directed verdict for defendants, the failure of

> the District Court to grant King a jury trial in the present case was also, at most, harmless error.

774 F.2d at 229 (citations omitted).

While the Eighth Circuit's failure to reach the issue does not preclude this Court from considering it, the reason given for not reaching the issue is compelling and should persuade this Court not to review the jury trial issue. That is, since the evidence presented was not strong enough to overcome a directed verdict motion if a jury had been empaneled, the presence or absence of a jury makes no difference since it would have played no role in the decision. It is difficult to see how petitioner was harmed by the absence of a jury to which no questions would have been presented. Since any error caused no harm, the Eighth Circuit properly did not consider the issue.

Finally, the question petitioner seeks to present inaccurately states the actions of the District Court. In a misguided attempt to perjoratively characterize the District Court, petitioner claims that the District Court judge "converted" the action from one at law to one in equity. Petition at 5. In actuality, the respondents', defendants below, motion for summary judgment on petitioner's damage claims was granted. Pet. App. at 22-23. In the absence of any remaining damage claims, respondents objected to the empaneling of a jury. *Id.* The District Court properly concluded that there was no longer a constitutional right to a jury trial. *Id.* There was no "conversion" of petitioner's action.

While it is difficult to tell what issue petitioner is attempting to present, it is clear that the District Court's ruling on the jury trial issue after dismissal of the damages claims was correct and certainly raises no novel or undecided issue of federal law worthy of this Court's review. Petitioner's posi-

tion appears to be that since he *sought* legal relief in his complaint, even though it is no longer available, he is entitled to a jury trial. Petition at 6. This is contrary to the holdings of this Court and does not raise a substantial question meriting review.

The right to trial by jury is determined by the issues, not the pleadings. *Dairy Queen v. Wood*, 369 U.S. 469, 477-78 (1962); *Armco, Inc. v. Armco Burglar Alarm Co., Inc.*, 693 F.2d 1155, 1158 (5th Cir. 1982), citing 9 Wright & Miller, *Federal Practice and Procedure* § 2304 (1971) and *Hildebrand v. Board of Trustees of Michigan State University*, 607 F.2d 705, 709-710 (6th Cir. 1979). See *In Re Vorpahl*, 695 F.2d 318, 320 (8th Cir. 1982).

The Seventh Amendment requires a jury trial for actions which are legal and does not require a jury trial in actions which are equitable. *Parsons v. Bedford*, 7 L.Ed. 732 (1830); *Curtis v. Loether*, 415 U.S. 189, 193-194 (1974); *In Re Vorpahl*, 695 F.2d at 322. The result depends on the nature of the issue which is analyzed by considering: 1) premerger custom with reference to such questions; 2) the remedy sought; and 3) the practical abilities and limitations of juries. *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970). The predominant practical consideration has been the nature of the relief available. *Hildebrand v. Board of Trustees of Michigan State University*, 607 F.2d at 708.

After dismissal of the damage claims, the only remaining relief at issue was the appellant's request for a series of orders from the court to the University to reinstate, to purge appellant's file, to cease unconstitutional treatment, and to permanently restrain and enjoin defendants from terminating appellant. Supplemental Amended Complaint, Prayer for Relief 1-4. All of these orders are traditional equitable relief

which provide no right to a jury trial. *Katchen v. Landy*, 382 U.S. 323, 337 (1966); *Lee v. Crowse*, 284 F.Supp. 541, *aff'd.*, 396 F.2d 952 (10th Cir. 1968) (no jury trial under 42 U.S.C. § 1983 for injunctive relief); J. Moore, 5 Federal Practice, ¶ 38.24[1]. This was true prior to the merger of law and equity and remains true today. Since appellant's damage action was properly dismissed, and since the remaining claims were solely for equitable relief, he had no constitutional right to a jury trial and the district court properly struck the jury demand.

B. Circuit Decisions Are In Agreement That The Denial Of A Jury Trial Is Harmless Error Where A Court Properly Could Have Granted A Directed Verdict.

Petitioner's second argument in support of his petition is that there is a conflict among the Circuits. Again, petitioner's argument is not clear. It is either that the Eighth Circuit applied an incorrect directed verdict standard or that the procedure of analyzing the evidence to see if a directed verdict could have been granted, when a jury trial has been denied, is inappropriate. In making these arguments, petitioner has incorrectly stated what the Eighth Circuit did and has failed to properly analyze what the other Circuits have held. In any event, he has totally failed to show any conflict among the Circuits.

Petitioner references only the Fifth Circuit in attempting to create a Circuit conflict, apparently with respect to the review standard. However, he misstates the standard to be applied even in that Circuit when he states that "denial of a jury trial is reversible error if there were any factual disputes." Pet. at 8. In *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980), the appellee and the district

court had both recognized that failure to grant appellant's motion for a jury trial had constituted error. The issue the Fifth Circuit considered, then, was whether or not a directed verdict had been proper, thereby rendering the error harmless. In enunciating the review standard previously announced in the Fifth Circuit for the directed verdict they stated, *inter alia*, "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper . . . There must be a conflict in substantial evidence to create a jury question." *Id.* at 752. This is not a standard of "any factual dispute".

More importantly, petitioner has failed to recognize or understand the Eighth Circuit's action in this case. Petitioner's procedural due process claim was dismissed "on the basis of uncontradicted evidence". 774 F.2d at 228. The racial discrimination claim was dismissed because there was "no evidence presented from which a discriminatory motive . . . could have been inferred." *Id.* The first amendment claim was dismissed because there was "no evidence that any one involved with his termination was ever aware of his in-class statements." 774 F.2d at 229. The Eighth Circuit did not resolve factual disputes but relied on uncontradicted evidence or an absence of evidence. There is no conflict between the Eighth and Fifth Circuits on this point.

With respect to the procedure used by the Eighth Circuit, they did what other circuits have done when faced with a question of a denial of a jury trial. *Laskeris v. Thornbough*, 733 F.2d 260 (3rd Cir. 1984), *cert. denied*, 105 S.Ct. 260 (1984); *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980); *King v. United Benefit Insurance Company*, 377 F.2d 728 (10th Cir. 1967). They determined whether a

directed verdict would have been appropriate against each of the claims brought forward and, therefore, if error did occur, whether it was harmless.

Petitioner criticizes the Eighth Circuit's reliance on *Laskaris v. Thornbough*, 733 F.2d 260 (3rd Cir. 1984), *cert. denied*, 105 S.Ct. 260 (1984) for precedent, claiming the case is inapplicable because that trial court had, in fact, granted a motion for directed verdict. Again, petitioner has misread or misrepresented the Third Circuit case. In *Laskaris*, the trial court granted a motion to strike the jury, the plaintiffs presented their evidence and then the court considered several motions to dismiss under Fed. R. Civ. P. 41(b) filed by separate defendants. The court granted the Rule 41(b) dismissal against only one defendant. After trial the court granted another 41(b) motion, under the rule a decision on the merits, and decided on the merits for two remaining defendants.

The review by the Third Circuit, therefore, considered whether a directed verdict *would* have been warranted. The Third Circuit, like the Eighth, reviewed the evidence comprising the record and concluded that there was no minimum quantum of evidence from which a jury might reasonably afford relief. 733 F.2d at 266.

The Tenth Circuit is also in agreement. In *King v. United Benefit Insurance Company*, 377 F.2d 728 (10th Cir. 1967), a trial judge denied a jury erroneously believing it was not demandable as of right in the circumstances. Again, the circuit court considered the evidence submitted to determine if the denial of jury trial was harmless error. The Tenth Circuit cites supporting cases in the Second, Seventh and Eighth Circuits. 377 F.2d at 731.

The agreement in the circuits is founded on the concept that "error must be disregarded unless the losing party was

prejudiced by it." Barron & Holtzoff, *Federal Practice and Procedure*, (Wright ed.), § 1354.1, p. 452. The Eighth Circuit determined after a careful review of an extensive record that a directed verdict could have been entered against King on each of his complaints. Thus, if an error occurred, it caused no harm.

CONCLUSION

There is no important undecided question of federal law or a conflict among the Circuits presented by this case. There is only a very weak claim which was unable to be supported by evidence which was justly decided by both the Eighth Circuit and the District Court. The writ of certiorari should be denied.

Dated: March 5, 1986

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1323 (3)

IN THE
Supreme Court of the United States

GEORGE D. KING,

Petitioner,

vs.

UNIVERSITY OF MINNESOTA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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Respondents err in asserting that there is no important undecided question. In *Curtis v. Loether,* 415 U.S. 189 (1974) this court noted that it had **not** decided whether a jury trial right was determined by relief requested at the commencement of suit or relief available at the time of trial.

> The Court of Appeals concluded that the right to a jury trial was properly tested by the relief sought in the complaint and not by the claims remaining at the time of trial. 467 F.2d, at 1118-1119. We need express no view on this question."

Curtis v. Loether, supra at 196 n.11. That issue is now presented to this court.

I. IF THE COURT DID NOT CONVERT THE ACTION FROM AT LAW TO EQUITY, THEN IT REMAINED AT LAW AND A JURY TRIAL WAS CONSTITUTIONALLY REQUIRED.

Respondents state the judge did not convert the action at law to a suit in equity, "when it granted summary judgment on all damages claims, it concluded that plaintiff no longer had a right to a jury trial.. There was no 'conversion' of petitioner's action" Respondents Brief at 7.

If the suit was not converted, then it remained an action at law and under the Seventh Amendment the jury right had to be preserved:

> **In Suits at common law... the right of trial by jury shall be preserved ...**

The role of a jury is to find facts: it is not limited to a mathematical role of computing damages. Liability is the crucial issue. Whether the judge or jury determines the extent of damages is far less important than the issue of who determines whether there was an abuse of power.

Could plaintiff deprive the defendant of its right to a jury trial on liability merely by omitting a damages prayer ?

If state university professors who have tenure have no remedy at law, then they should clearly be entitled to temporary restraining orders and preliminary injunctions because the major criteria of 'no adequate remedy at law' will readily be met. In this case, Petitioner's motion for preliminary injunction was denied, in part, because the court ruled that plaintiff had an adequate remedy at law. Then the court denied the remedy at law.

CAUSATION IS NOT BROKEN BY THE FINAL DECISION-MAKERS.

Since the filing of this petition, this court has decided a case which clearly exposes the error of the trial court in its dismissal of damages with the ultimate effect of the jury being stricken. In *Briggs v. Malley,* 54 U.S.L.W. 4243 (March 5, 1986), this court recognized that the "District court's 'no causation' rationale is inconsistent with our interpretation of § 1983." *Briggs v. Malley, supra* at 4245-46 n.7 (March 5, 1986). The damages dismissal against Respondent Lukermann herein was predicated on the same rationale used by the District Court in *Briggs* i.e., the lack of causation. Since the issue of a

jury trial was premised on a wrong rationale, this alone warrants reversal.

Respondents assert that the board's decision favorable to petitioner was precipitated by "new" affidavits submitted on behalf of petitioner. These affidavits did not contain new information. They contained 2 page summaries of a voluminous transcript. For example, one of the Respondents' key witnesses, Geneva Southall, had summarized her testimony about the administration's obsession with getting rid of Petitioner and explained a prior departmental vote:

> "The administration repeatedly characterized Professor King as the problem hindering departmental progress. This attitude led the department to vote to take him out of the department and let his skills be used elsewhere in the University community. I never intended the vote to be viewed as a request for his removal from the University. It was the only way the department could get onto other business." (emphasis in original affidavitt)

Respondents ignore recent decisions of this court which clarified the abuse of power protection afforded by the due process clause. The 14th Amendment contains a "substantive component, sometimes referred to as 'substantive due process', which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.' Ante, at 5" See Concurring opinion, J. Stevens, *Daniels v. Williams,* 54 U.S.L.W. 4090,93 (1-21-86).

This court has afforded the protection of substantive due process to the interest of a tenured teacher whose employment

was terminated, See Concurring opinion of J. Powell in *Regents of the University of Michigan v. Ewing*, 54 U.S.L.W. 4055, 4059 (12-12-85) citing Cf. *Harrah Independent School District v. Martin,* 440 U.S. 194 (1978). Respondents attempt to sidestep the substantive component. Petitioner, as a tenured full professor, had a right to a jury trial on the issue of whether the Respondents' actions in taking away his property were arbitrary or an abuse of power, regardless of the procedures. "Historically, the guarantee of due process has been applied to **deliberate** decisions of government officials to deprive a person of ... property." *Daniels v. Williams*, 54 U.S.L.W. 4090,91 (1-21-86). The mobilization of faculty to seek reversal of the Board's decision favorable to Petitioner was clearly a deliberate act. The political pressure negated any procedural due process and raised the fact question of abuse of power.

II. DIRECTED VERDICT STANDARD IS NOT PROPER FOR A COURT TRIAL.

Respondents' position that the "evidence presented was not strong enough to overcome a directed verdict motion if a jury had been empanelled" is itself refuted by the trial court's decision not to grant their motion. Whether there was sufficient evidence for a factual dispute is a **threshold** question. Once, the federal court had decided that there were questions of fact, by its decision to deny Respondents' motion for dismissal, reexamination of the threshold question is foreclosed. It is further negated by the trial court's decision on the merits, rather

than under Rule 41 (b). At no time did the trial court determine that there were no material fact questions on the issue of liability. Defendants have tried to reverse the effect of the trial court's decision on the merits and convert it into a Rule 41 dismissal. The rule provides that "a dismissal under this subdivision [Rule 41 (b)] ...operates as an adjudication upon the merits." The District Court did not dismiss plaintiff's complaint. It ruled on the merits. Defendants attempt to convert the court's decision on the merits into a Rule 41 dismissal, in effect a nonsuit. Such sophism cannot be used to retroactively justify the denial of a jury trial.

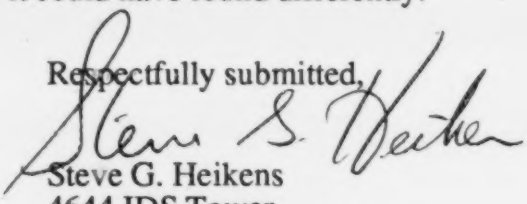
Any good trial attorney knows that cases are tried differently when it is to the court rather than to a jury. *Hildebrand v. Board of Trustees of the State Univeristy of Michigan*, 607 F. 2d 705, 710 (6th Cir. 1979). It was incorrect to apply a directed verdict standard when trial was to the court.

CONCLUSION

The denial of a jury was based on an erroneous premise-lack of causation. Nevertheless, the Constitutional right to have a jury decide a question of the abuse of power should not be determined solely by whether damages claims remain at trial. Such a principle is inconsistent with prior decisions of this court and would deny the essence of a jury -- to decide the real issue, liability. Was there an abuse of power?

Denial of a jury must be tested by the threshold issues--whether the court recognized that material fact questions existed, not whether it could have found differently.

Respectfully submitted,



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